

BEFORE LINDA McCULLOCH, STATE SUPERINTENDENT OF PUBLIC INSTRUCTION
STATE OF MONTANA

Lame Deer Elementary District #6)	OSPI Case No. 315-07
Board of Trustees, Rosebud County, Montana)	
)	
Appellants,)	DECISION AND ORDER
)	
-vs-)	
)	
Verna Ivey,)	
)	
Respondent.)	

Having reviewed the record and considered the parties' briefs, the Superintendent of Public Instruction issues the following decision and order:

The October 12, 2007, Order of the Acting County Superintendent is AFFIRMED.

PROCEDURAL HISTORY

The Board of Trustees of Lame Deer Elementary School District No. 6, Rosebud County ("District"), hired Verna Ivey ("Ivey") to work as a principal from August 7, 2006, through June 7, 2007. (Order dated 10/12/2007; Ivey Exhibit 7, Motion of District dated 9/12/2007.) On April 18, 2007, the District voted not to renew Ivey's 2006-07 contract as a principal for the 2007-08 school year. (Reply Brief of District dated 2/11/2008; Ivey Exhibit 18.) On May 9, 2007, District Superintendent Gary Scott suspended Ivey without pay for the remainder of the school year and advised her of her right to appeal his decision to the District's board of trustees. (Ivey Exhibit 13.) On May 17, 2007, the District heard Ivey's appeal in executive session and subsequently voted to suspend Ivey without pay for the remainder of the 2006-2007 school year, with the option of revoking her certificate. (Order dated 10/12/2007; Ivey Exhibit 17.)

On June 13, 2007, Ivey filed a Notice of Appeal with the Rosebud County Superintendent. (Notice of Appeal dated 6/13/2007.) On June 26, 2007, Rosebud County Superintendent, Sharyn Thomas, issued an order finding the County Superintendent had jurisdiction to review the matter, recused herself, and appointed Susan Beley, Wheatland County Superintendent, to hear the case. (Order dated 6/26/2007.)

On July 25, 2007, a telephonic hearing was held. (Order dated 7/30/2007.) Ivey stated she had six claims against the district for which she was seeking damages. The District raised the issue of whether the County Superintendent had jurisdiction to hear Ivey's claims. (Order dated 7/30/2007.) On July 30, 2007, the County Superintendent issued an Order directing Ivey to file an amendment to her pleadings stating all claims and the remedy sought; directing the District to respond to Ivey's complaint or to file a motion to dismiss; and directing both parties to address the issue of jurisdiction, specifically Mont. Code Ann. §§ 20-3-210, 20-4-206, and 20-4-207. (Order dated 7/30/2007.)

On August 27, 2007, Ivey filed a Response to Order Dated July 30, 2007. (Response to Order dated 8/27/2007.) On September 12, 2007, the District filed a motion to dismiss the appeal, alleging the County Superintendent did not have jurisdiction to hear the appeal. (Motion to Dismiss dated 9/12/2007.) The County Superintendent held a telephonic hearing on October 9, 2007. On October 12, 2007, the County Superintendent issued an Order dismissing Ivey's request that the District officially withdraw its recommendation to revoke Ivey's certificate, and remanding the matter to the District to hold a hearing under Mont. Code Ann. § 20-4-207 to establish good cause to dismiss Ivey or, alternatively, to pay Ivey her salary through the end of the 2006-07 contract. (Order dated 10/12/2007.) The County Superintendent determined the District did not follow the process required by Mont. Code Ann. § 20-4-207 for dismissal of a teacher under contract. On November 6, 2007, the District filed a Notice of Appeal with the State Superintendent.

ISSUE ON APPEAL

Does the County Superintendent have jurisdiction to hear this appeal?

STANDARD OF REVIEW

The State Superintendent's review of a county superintendent's decision is based on the standard of review of administrative decisions established by the Montana Legislature in Mont. Code Ann. § 2-4-704 (2007) and adopted by the State Superintendent in Admin. R. Mont. 10.6.125:

(4) The state superintendent may not substitute his/her judgment for that of the county superintendent as to the weight of the evidence on questions of fact. The state superintendent may affirm the decision of the county superintendent or remand the case for further proceedings or refuse to accept the appeal on the grounds that the state superintendent fails to retain proper jurisdiction on the matter. The state superintendent may reverse or modify the decision if substantial rights of the appellant have been prejudiced because the findings of fact, conclusions of law and order are:

- (a) in violation of constitutional or statutory provision;
- (b) in excess of the statutory authority;
- (c) made upon unlawful procedure;
- (d) affected by other error of law;
- (e) clearly erroneous in view of the reliable probative and substantial evidence on the whole record;
- (f) arbitrary or capricious or characterized by abuse of discretion or clearly unwarranted exercise of discretion;
- (g) affected because findings of fact upon issues essential to the decision were not made although requested.

Admin. R. Mont. 10.6.125 (4).

Findings of fact are reviewed under a clearly erroneous standard. *Steer, Inc. v. Dept. of Revenue*, 245 Mont. 470, 474, 803 P.2d 601, 603 (1990). The Montana Supreme Court set forth the three prongs of the clearly erroneous standard of review which applies to findings of fact:

We adopt the following three-part test to determine if a finding is clearly erroneous. First, the Court will review the record to see if the findings are supported by substantial evidence. Second, if the findings are supported by substantial evidence we will determine if the trial court has misapprehended the effect of evidence. *Western Cottonoil Co. v. Hodges* (C.A. 5th 1954), 218 F.2d 158; *Narragansett Improvement Co. v. United States* (C.A. 1st 1961), 290 F.2d 577. Third, if substantial evidence exists and the effect of the evidence has not been misapprehended the Court may still find that "[A] finding is 'clearly erroneous' when, although there is evidence to support it, a review of the record leaves the court with the definite and firm conviction that a mistake has been committed." *U.S. v. U.S. Gypsum Co.* (1948), 333 U.S. 364, 68 S. Ct. 525, 92 L. Ed. 746.

Interstate Production Credit v. DeSaye, 250 Mont. 320, 323, 820 P.2d 1285, 1287 (1991).

Conclusions of law are reviewed to determine if the interpretation of the law is correct.

"The reasoning for simply determining if the [superintendent's] conclusions are correct is that no discretion is involved when a tribunal arrives at a conclusion of law – the tribunal either correctly or incorrectly applies the law." *Steer, Inc. v. Dept. of Revenue*, 245 Mont. 470, 474, 803 P.2d 601, 603 (1990); *Baldrige v. Bd. of Trs.*, 264 Mont. 199, 205, 870 P.2d 711, 714 (1994).

FINDINGS OF FACT

1. Verna Ivey was hired by the District to perform duties as principal from August 7, 2006, through June 7, 2007. (Order dated 10/12/2007; Ivey Exhibit 7; Motion of District dated 9/12/2007.)
2. Ivey was not a tenured teacher as defined by Mont. Code Ann. § 20-4-203. (Order dated 10/12/2007.)
3. On April 18, 2007, the District's board of trustees voted to not renew Ivey's 2006-07 contract for the 2007-2008 school year. (Ivey Exhibit #18; Reply Brief of District dated 2/11/2008.)
4. On May 9, 2007, Lame Deer Superintendent Gary Scott sent a notice to Ivey informing her she was suspended without pay for the remainder of the 2006-07 school year and she had the right to appeal his decision to the District's board of trustees. (Ivey Exhibit #13.)
5. On May 17, 2007, the District's board of trustees heard Ivey's appeal in executive session and voted to suspend Ivey without pay for the remainder of the 2006-2007 school year, with the option of revoking her certificate. Superintendent Scott was directed to contact the OPI regarding the board's decision. (Order dated 10/12/2007; Ivey Exhibit 17.)

CONCLUSIONS OF LAW AND OPINION

Issue 1. Does the County Superintendent have jurisdiction to hear this appeal?

The State Superintendent's duty in this matter is to determine if the County Superintendent correctly determined she had jurisdiction to hear Ivey's appeal.

The county superintendent of schools has authority to "hear and decide all matters of controversy arising in the county as a result of decisions of the trustees of a district in the county." Mont. Code Ann. § 20-3-210 (2007). The Superintendent of Public Instruction has prescribed and enforces "rules of practice and regulations for the conduct of hearings and the determination of appeals by all school officials of the state." Mont. Code Ann. § 20-3-107 (2007).

A person aggrieved by a final decision of the board of trustees of a school district in a contested case is entitled to appeal that decision to the county superintendent. Admin. R. Mont. 10.6.103.

A county superintendent, after receiving notice of an appeal, must determine whether the appeal is a contested case and whether she has jurisdiction over the matter. Admin. R. Mont. 10.6.104(1). In situations involving contested cases, the superintendent may resolve questions of jurisdiction based upon the pleadings or after a hearing, as necessary to suit the circumstances of the case. Admin. R. Mont. 10.6.104(2). If the county superintendent determines she does not have jurisdiction over a matter, she shall enter an order dismissing the appeal for lack of jurisdiction. Admin. R. Mont. 10.6.104(3). If the county superintendent determines the matter is a contested case pursuant to Admin. R. Mont. 10.6.104 and she has jurisdiction, she shall hear the appeal and take testimony in order to determine the facts related to the contested case. *Id.*

In reviewing a decision made by a school district board of trustees, the county superintendent is to submit a final decision in writing. Mont. Code Ann. § 2-4-623(1)(a) (2007). The decision must include findings of fact and conclusions of law, separately stated. *Id.* Findings of fact must be based exclusively on the evidence and on matters officially noticed. Mont. Code Ann. § 2-4-623(2) (2007).

Thus, according to the regulations, a county superintendent can resolve jurisdictional questions in contested cases based on the pleadings alone; no hearing is mandated. The county

superintendent is required to have a hearing only if the matter involves a contested case and she has jurisdiction.

"Contested case" is defined as "any proceeding in which a determination of legal rights, duties or privileges of a party is required by law to be made after an opportunity for hearing." Admin. R. Mont. 10.6.102.

The Montana Supreme Court has determined a dispute does not rise to the level of a contested case unless the individual has a constitutional interest at stake or a statutory right to a hearing. *Roos v. Kircher Public Sch. Bd. of Trs.*, 2004 MT 48, ¶10, 320 Mont. 128, 131, ¶10, 86 P.3d 39, 41, ¶10 (2004) (nontenured teacher whose contract was not renewed failed to allege any violation of state statute granting an administrative hearing or constitutionally protected interest which would entitle her to a hearing before the county superintendent). Quoting from a decision issued by the State Superintendent of Schools, the court in *Roos* said,

In *Bland v. Libby School District* (1993) (OSPI 205-92, 12 Ed. Law 76), the State Superintendent stated, "To be appealable to the County Superintendent the policy decision at issue must be governed by a statute that grants an administrative hearing or an interest constitutionally protected by due process must be at stake . . ."

Id. See also *Dupuis v. Bd. of Trs., Ronan Sch. Dist. No. 30*, 2006 Mont. 3, ¶10, 330 Mont. 232, 235-236, ¶10, 128 P.3d 1010, 1012, ¶10 (2006) ("a county superintendent does not have jurisdiction over a matter absent a constitutional or statutory right to a hearing") (discrimination claim based on school's use of names "Chief" and "Maiden" should have been brought before Montana Human Rights Commission, not county superintendent).

Ivey was suspended without pay on May 9, 2007, through the end of the school year, by Gary Scott, Lame Deer Superintendent. On May 17, 2007, the District trustees voted to suspend Ivey without pay for the remainder of the 2006-2007 school year. Thus Ivey's suspension without pay, starting from Scott's action, lasted twenty-one school days (May 9 – June 7, including one day for a Memorial Day holiday).

Teachers in Montana, whether tenured or not, have due process rights when a district intends to dismiss a teacher for good cause before the expiration of the teacher's employment contract. Mont. Code Ann. § 20-4-207 (2007) requires written notice to each trustee and the teacher of a recommended dismissal. The notice must state clearly and explicitly the reason(s) leading to the recommendation for dismissal. *Id.* The trustees must notify the teacher of the right to a hearing before the board by certified letter or by personal notification with a signed receipt. *Id.* Unless the teacher waives the right to a hearing, the hearing must occur ten to twenty days from the notice of intent to recommend dismissal. *Id.* "[A] person who recommends dismissal . . . may suspend the teacher from active performance of duty with pay pending the hearing date if the teacher's behavior or acts that led to the recommendation for dismissal are contrary to the welfare of the students or the effective operation of the school district." *Id.*

Mont. Code Ann. § 20-4-207 also applies to principals, although the term "teacher" is used throughout:

(15) "Principal" means a person who holds a valid class 3 Montana teacher certificate with an applicable principal's endorsement that has been issued by the superintendent of public instruction under the provisions of this title and the policies adopted by the board of public education and who has been employed by a district as a principal. For the purposes of this title, any reference to a teacher must be construed as including a principal.

Mont. Code Ann. § 20-1-101 (15) (2007) (emphasis supplied).

A single Montana Supreme Court decision provides some guidance on the issue of whether a teacher's suspension without pay for twenty-one school days implicates Mont. Code Ann. § 20-4-207. When three teachers were suspended without pay after drinking alcohol on a school bus following a mandatory staff-only field trip, a district court considered whether Mont. Code Ann. § 20-4-207 applied to a two-and-a-half-day suspension without pay. *Debar v. Trustees, Yellowstone Co. Elementary Sch. Dist. No. 2*, 244 Mont. 297, 299, 796 P.2d 1081, 1082 (1990). The teachers argued they were entitled to written notice and a hearing before they could be suspended; the

district contended the statute did not apply to short-term suspensions. *Id.* at 299, 796 P.2d at 1083.

The Montana Supreme Court noted "the question of whether a temporary suspension is governed by § 20-4-207, MCA, is a question of first impression in Montana." *Id.* After reviewing the statute, the court stated,

The District Court differentiated between "dismissals" and "temporary suspensions". It concluded that while the above statute explicitly deals with permanent dismissals, there is nothing to suggest any legislative intent that it apply to temporary suspensions. Therefore, the lower court held that "it is not a violation of that statute for a short-term disciplinary suspension to be imposed by school district central administrative personnel, without Board action." We agree with the conclusion of the District Court. We hold that **2 ½ days disciplinary suspensions imposed by administrative personnel do not constitute dismissals which come under the provisions of § 20-4-207, MCA.**

Id. (emphasis supplied). The court specifically drew a distinction between a short-term, two-and-a-half-day disciplinary suspension and a dismissal.

The District non-renewed Ivey's contract on April 18, 2007. This, however, only meant Ivey had no expectation of employment with the District following the 2006-2007 school year; the non-renewal did not affect the agreement between Ivey and the District for the 2006-2007 school year.

Following Superintendent Scott's decision, Ivey was suspended without pay for a full month, twenty-one school days, through the end of her contract with the District. This is, obviously, a much longer period of time than the two-and-a-half days the Montana Supreme Court found did not constitute a dismissal under Mont. Code. Ann § 20-4-207.

Labeling a month-long removal without pay a "suspension" is not in keeping with the purposes and protections provided by Montana statute. The twenty-one school days without pay, through the end of Ivey's 2006-07 contract, was, constructively, a dismissal from employment. An interpretation that such a circumstance constituted a suspension could seriously threaten the rights of teachers otherwise protected by Mont. Code. Ann. § 20-4-207. For the State Superintendent to hold otherwise would permit school boards to circumvent teachers' contractual and statutory

employment rights; districts cannot assert a teacher who is not allowed to return to work and is without pay for a month, through the end of the school year, is suspended, rather than dismissed while under contract.

The District dismissed Ivey while she was under contract, even though it characterized its action as a suspension. It should have followed the procedures set forth in Mont. Code Ann. § 20-4-207.

Because the District's hearing on 5/17/2007 did not comply with the procedural requirements of Mont. Code Ann. § 20-4-207 for dismissal, Ivey's appeal from the District's action was not time-barred.

Montana law specifically addresses the jurisdiction of a county superintendent to hear appeals from a decision of trustees to dismiss a teacher under contract:

Controversy appeals and hearings. (1) Except for disputes arising under the terms of a collective bargaining agreement or as provided under 20-3-211 or 20-4-208, the county superintendent shall hear and decide all matters of controversy arising in the county as a result of decisions of the trustees of a district in the county. . . . Except as provided in subsection (2), exhaustion of administrative remedies under this chapter is required prior to filing an action in district court concerning a decision of the trustees. When appeals are made under . . . 20-4-207 relating to the dismissal of a teacher under contract, the county superintendent may appoint a qualified attorney to act as a legal adviser who shall assist the superintendent in preparing findings of fact and conclusions of law.

Mont. Code Ann. § 20-3-210.

In her Order, the County Superintendent determined,

A District may suspend a teacher under contract but may not dismiss them [sic] during the contract year without good cause. . . . In this case, it does not appear that the procedures for dismissal of a teacher under contract have been followed. . . . The County Superintendent is remanding this matter to the Board of Trustees of the Lame Deer District for a hearing as provided under 20-4-207, MCA regarding whether the trustees had good cause to dismiss Ivey on May 17, 2007, before the expiration of her employment contract. Alternatively, the District may choose to perform its contractual obligation through June 7, 2007 and pay Ivey her salary through the end of the 2006-2007 contract.

(Order dated 10/12/2007.)

Under *Steer* and *Baldridge, supra*, the State Superintendent reviews the Acting Rosebud County Superintendent's legal conclusions to determine if her interpretation of the law was correct. Here the Acting County Superintendent correctly concluded she had jurisdiction to hear Ivey's appeal.

DECISION AND ORDER

The Acting Rosebud County Superintendent's Order is AFFIRMED.

DATED this 18th day of April, 2008.

/s/ Linda McCulloch
Linda McCulloch,
Superintendent of Public Instruction

NOTICE:

You are entitled to judicial review of this Decision and Order in accordance with Mont. Code Ann. § 2-4-702 (2007). Judicial review may be obtained by filing a petition in district court within thirty days after the service of this Order.

CERTIFICATE OF SERVICE

THIS IS TO CERTIFY that on this 21st day of April, 2008, I caused a true and exact copy of the foregoing DECISION AND ORDER to be mailed, postage prepaid, to the following:

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/s/ Kathleen Magone
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